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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 150

SLACK BROS., INC., *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

C. J. BAXTER,
902 American Security Building,
Washington, D. C.
Counsel for Petitioner.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Slack Bros. Inc., a Louisiana corporation, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the foregoing cause. That Court's opinion was rendered on February 15, 1944; and the petition for rehearing was denied on March 13, 1944.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 347), and by the Revenue Act of 1936, Title VII, Section 906(g) as amended by Section 510(j) of the Revenue Act of 1942, printed in the Appendix hereto.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Slack Bros. Inc., herein for convenience called Slack, was a grower and processor of sugarcane. The questions to be decided in the instant case are identical with those in *Caldwell Sugars, Inc.,* on which a petition for a writ of certiorari is being filed this day; and, excepting for the absence of a favorable margin, both Slack and *Caldwell* are almost identical with *Webre Steib Company, Ltd.,* on which a petition for a writ of certiorari is likewise filed this day. In fact, the Circuit Court in disposing of the law of the case, does so by reference to *Caldwell* decided the same day; and, we must turn to the *Caldwell* and *Webre* cases to determine the Court theory of the law. However, to complete the record, we set forth the matters independently.

Slack, during the period June 8, 1934, through November 30, 1935, paid processing taxes totaling $25,440.44 under the Agricultural Adjustment Act of 1933 as amended. It filed claim for refund of these taxes pursuant to Title VII of the Revenue Act of 1936. The Commissioner of Internal Revenue having disallowed this claim, petition was filed thereon with the United States Processing Tax Board of Review.

That Board heard the cause; but, before it made findings of fact and a decision, the said Board was abolished by Section 510 of the Revenue Act of 1942 and jurisdiction transferred to The Tax Court of United States.

The Tax Court of the United States, without further hearing, made findings of fact and decided that your petitioner had not established that it bore the burden of the tax. (R. 41-42.)

To The Tax Court, the instant case and *Caldwell Inc.* were cases of first impression as the said Court had no previous experience under Title VII of the Revenue Act of 1936. From the decision of the Tax Court Slack filed a petition for review in the Circuit Court of Appeals for the

Fifth Circuit pursuant to the Revenue Act of 1936, Title VII, Section 906 (g).

The Tax Court made fact findings in substance as follows:

(a) that Slack was a grower and buyer of sugarcane, processing such sugarcane during a three months period (October to December) each year, after which it closed its factory until the ensuing season (R. 35);

(b) that from early spring 1933 to June 1934 conditions in the sugar industry were uncertain and confused finding a number of different factors that affected the price (R. 37 to 39).

(c) that on the effective date of the tax the general price level of refined sugar increased slightly more than the tax (R. 38); and that from mid-September 1933 to June 1, 1934 the price of sugar declined 60 cents; also that there was at least 50 percent more sugar available than could be consumed in a year (R. 38);

(d) that the tax period margin compared with the statutory base period margin was unfavorable to Slack (R. 39);

(e) that the processing tax was not billed as a separate item on Slack's invoices except for $565.35 on molasses (R. 40); and

(f) that the quota system of control remained in effect after the tax period (R. 39).

The foregoing fact findings by The Tax Court are the pertinent ones here. Important too, are facts that The Tax Court failed to find, namely:

(a) that Slack did no processing during the period six months after the tax (Stipulation, paragraph 1, R. 51);

(b) that Slack marketed from 80 to 97 percent of its sugar during the period November to February; and, that the price during the first year of the tax was about the same as it was during the preceding year (Stipulation, paragraph 2, R. 51 and 52); and

(c) that if the 1936 crop had been equal to the tax period crop in yield of sugar per ton of cane, a margin computation based thereon would have been favorable to Slack (Stipulation, paragraph 4, R. 54).

Slack filed a petition for review with the Circuit Court of Appeals for the Fifth Circuit on the grounds that Slack had rebutted the adverse margin by a showing that conditions were not comparable; had further shown that it had borne the entire burden of the tax (excepting $565.35) by the price being the same during the tax period as during the preceding crop; and that the 1936 crop under similar conditions (except the tax) showed a margin revealing that Slack bore the tax; and therefore, the decision was not sustainable in law.

The Circuit Court affirmed The Tax Court on the authority of *Caldwell* decided that day (R. [illegible]). In that case the decision was based on the premise that the adverse margin gave rise to a presumption that the burden had been shifted. This conflicts with the rationale of *Webre Steib Co. Ltd.* v. *Com.* (140 F. (2d) 768) decided by the same Court wherein it held that the statutory presumption was dissolved citing *Commissioner* v. *Bain Peanut Company* (134 Fed. (2d) 853). Likewise that the 1936 crop experience did not give rise to any presumption or "otherwise satisfy the burden of proof that rested upon" Slack.

Slack's contentions are that the fact findings made by The Tax Court rebut the presumption created by the statutory margin test; that the findings The Tax Court made with respect to the 1936 crop do establish the actual extent to which Slack bore the burden of the tax; and, that the Court erred in failing to find from the evidence, stipulated in the record on appeal (R. 51-52), that the price during the tax period was the same as during the preceding year, and therefore, that Slack established that it bore the entire burden of the tax. Hence from Slack's viewpoint these are the

QUESTIONS PRESENTED.

1. What meaning and effect did Congress, in Section 907 of the Revenue Act of 1936, intend to give to the "prima facie evidence" arising from the comparison of the average margins computed as therein authorized?

2. Was the evidence submitted by Slack sufficient to rebut the prima facie showing made by the Commissioner under Section 907(a) of the Revenue Act of 1936?

3. Is the decision of The Tax Court, affirmed by the Circuit Court, sustainable in law when, as here, The Tax Court finds conditions in the base period dissimilar from those existing in the tax period; and, further finds that a comparison with the succeeding year indicates that Slack bore the entire burden of the tax?

4. Did The Tax Court, and the Circuit Court, neither of whom heard the case, but each reviewing a record, err in failing to find from the evidence that since Slack received no higher price during the tax period than it did during the preceding season, such evidence was relevant and established the ultimate fact that the tax was not passed on in the selling price?

REASONS FOR GRANTING THE WRIT.

1.

In construing Section 907 of the Revenue Act of 1936 the Circuit Court of Appeals decided in one day three cases to writ: *Webre Steib Company Ltd., Caldwell Sugars, Inc.* and the instant case. Certiorari is sought in all three cases. In *Webre Steib* the presumption was in favor of the taxpayer and the Court held the presumption dissolved on the evidence advanced by the Commissioner. In the instant case and *Caldwell Sugars, Inc.* the Court proceeded on the presumption in spite of fact findings establishing that the presumption was rebutted. In *Webre Steib* the Court followed its analysis of the presumption in *Commissioner* v. *Bain*

Peanut Company (134 F. (2) 853). This Court granted certiorari in *Bain Peanut Company of Texas* v. *Commissioner* (320 U. S. 721). However, this Court did not decide the question as the petition was dismissed on motion of the *Bain Peanut Company* on March 6, 1944. The question is more important now, than it was when this Court granted certiorari in the *Bain* case (*supra*) as the said Circuit Court of Appeals continues to follow the *Bain* case at times and not in others (see also *Byars* v. *Commissioner*, 138 F. 2d 513 at 514).

2.

The importance of the question is readily apparent from an examination of Title VII of which Section 907 is a part (see appendix). This Title prescribes an exclusive method of obtaining refunds of processing taxes paid under the unconstitutional provisions of the Agricultural Adjustment Act of 1933: *Anniston Manufacturing Company* v. *Davis* (301 U. S. 337). Claims for refund were easily known to be so numerous and important that Congress in Section 906 felt impelled to establish a special agency, the Processing Tax Board of Review, to hear and pass upon refund claims exclusively. This case was heard by the Processing Tax Board. However, before it made findings and a decision jurisdiction was transferred to The Tax Court—a Court with no previous experience at all on the complex subject. The instant case and the *Caldwell, Inc.* case decided the same day are the first cases of this type that The Tax Court decided, and it did so without having heard the evidence or listened to oral argument. At the heart of every claim is the comparison of average margins for the tax period and the period before and after the tax; no claimant can get his claim considered without presenting this prescribed margin computation or without having the margin computation invoked against him. It is obviously important to all taxpayers having refund claims now to know whether the prima facie evidence or the presumption established by

Subsection (a) of Section 907 is to disappear wholly and be completely dissolved when any substantial rebutting evidence is produced, or, as Subsection (e) would seem to indicate, must it be rebutted "by proof of the actual extent to which the claimant shifted to others the burden of the processing tax"—and, what constitutes proof of the actual extent?

3.

Furthermore, in the present case—as in the *Caldwell* case filed this day—the Fifth Circuit Court of Appeals has rendered decisions in conflict with other Circuit Court of Appeals on the same state of facts. We refer to *Helvering* v. *Insular Sugar Refining Co.* (not yet reported, but appearing in Commerce Clearing House 1944 Federal Tax Service, paragraph 9260) decided by the United States Court of Appeals for the District of Columbia on March 27, 1944. That was a sugar processing case too. There the Processing Tax Board found for the taxpayer and the appellate Court affirmed. Here The Tax Court held against the taxpayer and the Fifth Circuit affirmed.

There, as here, there was a price increase on the effective date of the tax in an amount slightly in excess of the tax. There, as here, the taxpayer was not in the market for some months after the tax was inaugurated. There, as here, the price at the time of marketing was about the same as during the same period of the preceding year. There, as here, the price after the tax was invalidated was higher than during the tax period. There, as here, the taxpayer had no part in making or controlling the current market. There, the Court of Appeals for the District of Columbia held that such factors did not destroy the presumption favorable to the taxpayer. Here, the Fifth Circuit held such evidence supported the presumption unfavorable to the taxpayer, even though such unfavorable presumption is accounted for by the factors (R. 38).

With identical states of fact two different trial courts, one experienced and the other inexperienced, reach opposite results and the appellate Court affirms in each case. This is error requiring the exercise of the Supreme Court's jurisdiction to correct it.

4.

The Circuit Court of Appeals in this case (and *Webre Steib* and *Caldwell* filed this day) conflicts with the *FOURTH CIRCUIT* as to the relevancy of other evidence advanced by Slack upon a showing that the statutory margin periods are not comparable. Here The Tax Court found that the base period was "uncertain and confused" (R. 39); that immediately before the June 8, 1934 price rise the market had declined 60 cents (R. 38); and, that a computation based on the 1936 crop (the next succeeding one) would show that Slack bore the burden of the tax (R. [illegible]).

In *Epstein* v. *Helvering* (120 F. (2d) 427) the Fourth Circuit Court of Appeals excluded the post-tax period from a margin computation because conditions had changed, stating at page 430:

> "It is manifest from these figures that a comparison of the statutory margins does not furnish a reliable method for the solution of the issue in this case. Such a method is of no value unless, throughout the successive periods, all the factors, except the tax, entering into the manufacture and sale of the goods remain constant."

The same Court in *Arkwright Mills* v. *Commissioner* (127 F. (2d) 465), held that a period after the tax that included the statutory post-tax period was proper rebuttal of the statutory margin. It stated at pages 467-8:

> "We understand the Board to hold that the evidence as to change in demand in the periods chosen by Congress for comparison should be ignored because the

evidence represents merely an attempt to show what the taxpayer's margin would have been during the tax period if there had been no tax; and because this effort involves the setting up of a hypothetical or imaginary situation which has no tendency to prove the actual extent to which the taxpayer bore the burden of the tax. This point of view in our opinion cannot be maintained. In the first place it is manifest that the statutory test, which Congress itself devised, involves a comparison of the taxpayer's actual position during the tax period with what it would have been if there had been no tax. * * * Clearly, this test assumes that all the factors except the tax which affect the margins are the same in both periods, for otherwise the comparison would not show whether the taxpayer bore the burden or not; and this assumption involves the very sort of hypothesis which the Board condemns. That this is true is recognized by high authority. See Statement of Secretary of Agriculture Wallace before Finance Committee on Title VII of the Revenue Act of 1936, Hearings before Committee on Finance, United States Senate, 74th Congress 2nd Session, on H. R. 12,395, p. 859; Ferger on Windfall Tax and Processing Tax Refund, American Economic Review, March, 1937, p. 52.

"Moreover, there is no novelty or vice in the hypothetical approach to the ascertainment of a person's rights or the extent of damage wrongfully imposed upon him. Valuation of property involves the ascertainment of a hypothetical selling price. Breach of contract often involves a hypothetical loss of profits. Personal injury often requires an estimate of earnings that would have been made had the injury not occurred. Frequently the investigation of these matters is of such difficulty that mathematical certainty in the determination of amounts is impossible; but rights are not lost thereby, and it becomes the duty of the courts to find the relevant facts and to base a reasoned judgment upon them. * * *."

C. J. Batter,
902 American Security Building,
Washington, D. C.,

Counsel for Petitioner, Slack Bros., Inc.